BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHEYENNE E. STOUT	)	
Claimant	)	
V.	)	
	)	
CHANUTE HEALTHCARE CENTER	)	Docket No. 1,063,194
Respondent	)	
AND	)	
	)	
PREMIER GROUP INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of Administrative Law Judge Bruce E. Moore's January 31, 2014 preliminary hearing Order. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Terry Torline of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of claimant's February 1, 2013 deposition transcript, the June 12, 2013 preliminary hearing transcript and exhibits thereto, and the January 14, 2014 deposition transcript of Paul S. Stein, M.D., and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant alleges injury to her back, buttocks, both legs and all other affected parts of her body from lifting a patient on or about March 22, 2012.

In a January 31, 2014 preliminary hearing Order, Judge Moore concluded claimant failed to prove personal injury by accident arising out of and in the course of her employment, including that the alleged March 22, 2012 accident was not the prevailing factor in causing claimant's injury, need for treatment or resulting impairment or disability.

Claimant requests the preliminary hearing Order be reversed, arguing she proved personal injury by accident arising out of and in the course of her employment, including that her accident was the prevailing factor in causing her injury. Claimant further contends K.S.A. 44-508 is unconstitutional. Respondent maintains the Order should be affirmed.

The only issue the Board can address concerns compensability, including whether claimant's asserted accident was the prevailing factor in her injury, medical condition, and resulting disability.

FINDINGS OF FACT

Claimant began working as a CNA for respondent in January 2012.

Claimant testified her back "gave out" while attempting to lift a resident on March 22, 2012. She testified that she fell to the ground and had immediate pain in her lower back radiating down her left leg. Claimant testified that she immediately reported her accident to a supervisor. Claimant provided various times for the alleged accident, including 11:00 a.m., 11:30 a.m. and 1:00 p.m.[1] Claimant was 18 years old at the time of her accident.

During her lunch break on March 22, 2012, claimant went on her own to her personal physician, Greta McFarland, M.D, at the Ashley Clinic. Dr. McFarland recorded:

> Since she woke up this am, the back was hurting in this same area. She did go to work. She is a CNA at Chanute health care, and around 11 am she was holding someone, and then had shooting pains in the middle of the back and some on the right in the lumbar area. She fell completely down, landing on her buttocks. The pain occurred suddenly.[2]

Claimant made no complaints to Dr. McFarland of numbness or tingling and indicated the pain went up her back about 6-8 inches. While she denied prior back pain, claimant reported that for the last two weeks, her back felt like it was "stuck" when bending forward.[3] Dr. McFarland diagnosed claimant with acute back pain, ordered x-rays, prescribed medication and referred her to an orthopedist.

Claimant denied telling Dr. McFarland that she woke up with back pain the morning of March 22, 2012. She denied telling Dr. McFarland that she had back problems for two weeks prior to March 22, 2012. Claimant testified such information was "false."[4] Claimant denied any back problems whatsoever before March 22, 2012. Claimant further indicated Dr. McFarland's report was incorrect because her pain was to the left side of her low back and down her left leg.

According to claimant, Dr. McFarland suggested she go back to work and fill out an accident report. Claimant testified she returned to work and her supervisor told her she needed to see a workers compensation physician, "Dr." Thomas Cloven.[5]

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[1] Notice, pursuant to K.S.A. 2011 Supp. 44-520, was not at issue.

[2] P.H. Trans., Resp. Ex. A at 1.

[3] *Id.*

[4] P.H. Trans. at 15, 26-28, 53; Claimant's Depo. at 15,19-20.

[5] P.H. Trans. at 14. Mr. Cloven is a physician assistant, not a medical doctor.

Claimant was not seen by an orthopedic physician. Instead, on March 23, 2012, claimant was seen by Brett Olson, P.A.,[6] a physician assistant for William Dillon, M.D., an orthopedist. Mr. Olson recorded that claimant had "back pain in the lumbar spine that started yesterday when she woke up. . . . She has no known injury, however, she does a lot of lifting at her job. She denies any radicular symptoms or any weakness in the legs."[7] Claimant had negative straight leg raise testing bilaterally. Mr. Olson diagnosed claimant with low back pain and muscle spasm. Mr. Olson prescribed medication and physical therapy and provided work restrictions of no lifting for one week.

According to claimant, Mr. Olson's report that she woke up with back pain on March 22, 2012, was "false."[8] Claimant denied telling Mr. Olson her lumbar pain started when she woke up on March 22, 2012, she denied telling Mr. Olson that she had no known injury and, contrary to Mr. Olson's report, she testified she had left leg radicular complaints.[9]

On March 23, 2012, claimant completed a "Workers Compensation Reporting Form" for respondent indicating the date and time of her incident as March 22, 2012, at 11:30 a.m., and the date and time that she reported the incident as March 23, 2012, at 10:50 a.m.[10] In response to the form asking exactly what happened, claimant wrote: "I was having severe back problems & I went to the doctor & orthopedic. They said I am having back spazams [sic] due to lifting residents."[11]

That day, respondent sent claimant to the Ashley Clinic, where Thomas Cloven, P.A., a physician assistant to Martin Dillow, M.D., evaluated her. Claimant reported injuring her back while lifting a resident. Mr. Cloven noted claimant did not immediately report such incident to her supervisor. He recorded that claimant had palpable lumbar paraspinous spasm, but no pain radiating down her lower extremities. Mr. Cloven diagnosed claimant with back pain. He concurred with Mr. Olson's treatment recommendations.

Claimant testified Mr. Cloven's statement that she waited one day to give notice was inaccurate. Claimant testified Mr. Cloven's recording of no pain radiating down her lower extremities was inaccurate.

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[6] Claimant testified that Mr. Cloven referred her to Mr. Olson. (P.H. Trans. at 15, 18.)

[7] P.H. Trans., Resp. Ex. B.

[8] P.H. Trans. at 28.

[9] Claimant's Depo. at 19-21.

[10] Claimant testified Beth Shepard, respondent's Administrator, assisted in completing the accident report. (P.H. Trans. at 20).

[11] P.H. Trans., Resp. Ex. C at 1.

Claimant left her employment with respondent in early-April 2012 because she would have to do lifting. She never returned to work for respondent under her physical restrictions. On May 13, 2012, claimant started a CNA position with Applewood Rehabilitation, Inc. (Applewood). Claimant testified there was "no lifting in the job"[12] and it involved no bending or twisting. Claimant denied having an accident while working at Applewood.

On July 31, 2012, claimant returned to Mr. Olson with complaints of "low back pain and left leg radicular symptoms."[13] She reported left-sided lower back pain in the lumbar area that goes over the anterior portion of her thigh. Examination revealed positive straight leg raise testing on the left and negative on the right. Mr. Olson diagnosed claimant with low back pain with left leg radiculopathy and ordered an MRI.

On August 1, 2012, claimant had the lumbar MRI. She completed an MRI Patient Screening stating:

> **Reason for Exam:** lower back pains & pains in lt leg. Ø injury - 1½ wks ago pain got worse - limited ROM[14]

S. Dean Papp, M.D., interpreted the MRI study as showing degenerative changes from L3-S1, a minor herniated disc at L3-4, a herniated disc at L5-S1 oriented toward the left neural foramen, projecting posteriorly for at least five millimeters, as well as facet joint arthritis at L3-4 and L4-5.

Claimant returned to Mr. Olson on August 3, 2012. Mr. Olson noted claimant had 2+ reflexes on the right and 1+ on the left on the Achilles tendon. Mr. Olson's review of the MRI revealed a "herniated disc that causes some foraminal stenosis at L5-S1. There is also herniated disc that does not cause any stenosis at L3-4. There are degenerative changes noted in L3 through S1 and facet joint arthritis at L3-L4, L4-L5."[15] Mr. Olson recommended medication and physical therapy.

Claimant returned to Mr. Olson on August 20, 2012, for low back and left leg pain. She indicated medication provided no relief and that she had been unable to complete therapy due to the flu. She denied numbness or tingling. Mr. Olson recommended epidural steroid injections and a series of three injections was performed by Dr. Gibbs. Claimant testified that following the injections, Mr. Olson referred her to Brent Adams, M.D.

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[12] Claimant Depo. at 32.

[13] P.H. Trans., Cl. Ex. 2 at 3.

[14] Stein Depo., Ex. 6.

[15] P.H. Trans., Cl. Ex. 2 at 7.

Dr. Adams examined claimant on October 26, 2012. As part of the examination, claimant completed a pain drawing showing ache, pins and needles and stabbing pain in her left lower back and possibly her buttocks.[16]

Dr. Adams reported claimant had "no radicular complaints" and "is doing quite a bit of heavy lifting."[17] Dr. Adams interpreted the MRI study as revealing degenerative disc disease at L3-4, L4-5, and L5-S1 with disc dehydration. He diagnosed claimant with juvenile degenerative disc disease of the lumbar spine. Due to claimant's age, Dr. Adams recommended ongoing conservative care and that "she get into a lighter-duty-type job."[18]

Claimant could not explain why Dr. Adams' report said she did a lot of heavy lifting at Applewood. She reiterated her job at Applewood involved no lifting.

On January 1, 2013, claimant left her employment with Applewood and, on January 7, 2013, accepted a position with Tri-Valley Developmental Services as a residential service provider. She described her duties as driving to residents' homes, checking on their status on at least a daily basis, and assisting them in any way they needed, such as cooking, grocery shopping, cleaning, vacuuming and dishwashing.

On January 22, 2013, claimant was seen at her attorney's request by George Fluter, M.D. Claimant provided a history of her back giving out while she was lifting a resident on March 22, 2012. She denied a pop or snap. She was able to get the resident into bed before falling to the ground. Dr. Fluter diagnosed claimant with low back/left thigh pain/dysesthesia, lumbosacral strain/sprain, multilevel lumbar discopathy, probable facet arthrosis, and probable sacroiliac joint dysfunction. In addressing causation and prevailing factor, Dr. Fluter stated:

> **Causation:** Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between [claimant's] current condition and the reported work-related injury occurring on 03/22/12.
>
> The prevailing factor for the injury and the need for medical evaluation/treatment is the reported work-related injury occurring on that date. No other prevailing factor is readily identifiable.[19]

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[16] Claimant testified the pain drawing she filled out was inaccurate and did not show numbness in her left leg. (Claimant Depo. at 27). At her deposition, she drew symbols on the left thigh of the figure in the pain drawing, as reflective of a pins and needles sensation. Claimant testified such symptoms were present from March 22, 2012 forward.

[17] P.H. Trans., Resp. Ex. F at 1.

[18] *Id.*

[19] P.H. Trans., Cl. Ex. 1 at 5.

Dr. Fluter recommended medications, EMG, lumbar support brace, pool-based physical therapy with transition to regular therapy, a TENS unit, injections and an evaluation or second opinion by a neurosurgeon and/or an orthopedic spine surgeon. Dr. Fluter provided light duty restrictions.

Following a June 12, 2013 preliminary hearing, Judge Moore: (1) ordered respondent to pay the medical expenses incurred to date and (2) appointed Paul Stein, M.D., to determine whether the alleged accident was the prevailing factor in causing claimant's injury, need for medical treatment, or resulting disability or impairment, if any.

On August 2, 2013, claimant was seen by Dr. Stein, a neurosurgeon. The history provided by claimant was she was lifting a resident and her "back gave out and [she] dropped him." Claimant complained of left lower back pain with occasional radiation into the left thigh to the knee. She denied any numbness or tingling. Straight leg raising on the left produced mild left lower back discomfort without radicular features.

In addressing causation and prevailing factor, Dr. Stein stated:

> [Claimant] began having lower back pain subsequent to assisting a resident at work on 3/22/12. There is no history or documentation of prior lumbar symptomatology. The underlying pathology, however, is degenerative in nature. This is not typical at 18 years of age but is not unheard of and the degenerative changes were not caused by the incident at work. Given the mechanism of injury and the degenerative changes the primary or prevailing factor in the current symptomatology and need for treatment is the preexisting degenerative change. Absent this degenerative change the mechanism of injury at work was not likely to cause permanent injury and this degenerative change at her young age is likely to have become symptomatic absent the incident at work. The relationship between the incident at work and the current symptoms is one of aggravation of the preexisting pathology.[20]

Dr. Stein recommended a long-term program of abdominal and lumbar muscular strengthening through therapy and exercise. Given her underlying pathology and young age, Dr. Stein suggested claimant find alternate employment that does not require repetitive bending and twisting, frequent or heavy lifting.

Upon receipt of Dr. Stein's IME report, respondent filed an application for preliminary hearing and requested termination of benefits. A preliminary hearing was scheduled to occur October 2, 2013. At that time, claimant requested the opportunity to take Dr. Stein's deposition prior to the court's ruling. Judge Moore issued a preliminary hearing Order taking respondent's preliminary hearing requests under advisement pending submission of Dr. Stein's testimony.

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[20] Stein Report (dated Aug. 12, 2013) at 5.

Dr. Stein's deposition occurred on January 14, 2014. When questioned regarding the mechanism of injury, Dr. Stein acknowledged he did not know the weight of the patient claimant was lifting or if the patient was "dead weight" or shifting. Dr. Stein agreed that a factor in claimant's injury and her need for medical treatment was her lifting the patient and the lifting very likely caused claimant's herniated disc at L5-S1.[21] Dr. Stein agreed that had claimant just stayed home and did not go to work on March 22, 2012, she probably would not have suffered a herniated disc that day. However, Dr. Stein maintained his opinion that the prevailing factor in claimant's injury and medical condition was her preexisting degenerative disc disease: absent the preexisting juvenile degenerative disc disease, the injury would not have occurred.

After receiving and reviewing Dr. Stein's deposition, as well as the comments of counsel, Judge Moore issued a January 31, 2014 Order stating:

> Given the diagnosis of juvenile degenerative disc disease, the questionable nature of whether there ever was a specific lifting incident, the significant delay between the claimed incident and the onset of radicular complaints, and the opinion of the court-ordered neutral examiner that the claimed incident was not the prevailing factor in causing Claimant's injury, or need for treatment, the court **FINDS** and **CONCLUDES** that **Claimant has failed to sustain her burden of proof of personal injury, by accident, arising out of and in the course of her employment.** The court further **FINDS** and **CONCLUDES** that whatever occurred on March 22, 2012 was ***not*** the **prevailing factor** in causing Claimant's injury, need for treatment or resulting impairment or disability.

Claimant filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-501b(b) states an employer is liable to pay compensation where the employee incurs personal injury by accident arising out of and in the course of employment. Both the arising "out of" and "in the course of" employment conditions must be proven before compensation is allowable. Such phrases have separate and distinct meanings:

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[21] See Stein Depo. at 40.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[22]

K.S.A. 2011 Supp. 44-508 states, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(f) (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

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[22] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

Injury by accident does not arise out of employment unless the accident is the prevailing factor in causing the injury, medical condition, and resulting disability or impairment.

Dr. Stein, while aware claimant was alleging her injury was due to lifting a resident, opined the prevailing factor in causing claimant's current injury, medical condition, and resulting disability or impairment was her preexisting juvenile onset degenerative disc disease. There is nothing improper with Judge Moore adopting such opinion, in lieu of agreeing with Dr. Fluter's opinion that the prevailing factor was the asserted accident.

Claimant argues Dr. Stein's opinion is flawed because he did not know the weight of the resident claimant was lifting or if the resident was "dead weight" or shifting about. The current record contains no proof on any of these considerations. The resident's weight and movements, if any, are relevant, but it is claimant's duty to make a record and prove how such information impacts causation, including the prevailing factor component.

Based on Dr. Stein's prevailing factor opinion, this Board Member finds claimant's accident did not arise out of employment based on K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii).

Claimant argues the Kansas Workers Compensation Act is unconstitutional for violating due process and equal protection, including that the Act violates due process for failing to provide an adequate or reasonable remedy. Even if such specific arguments were raised to the judge[23] (they were not) and even if such issues were appealable from a preliminary hearing order (they are not), the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. Claimant may preserve the arguments for future determination before a proper court.

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[23] Claimant, at Dr. Stein's deposition, objected that the statute concerning prevailing factor is unconstitutional because it is arbitrary, capricious, vague and ambiguous.

CONCLUSIONS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes claimant's accident was not the prevailing factor in her injury, need for medical treatment and any resulting disability. As such, claimant's accident did not arise out of her employment based on K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii).

WHEREFORE, the undersigned Board Member affirms the January 31, 2014 preliminary hearing Order's denial of benefits based on the prevailing factor requirement.[24]

IT IS SO ORDERED.

Dated this _____ day of March 2014.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: William Phalen
wlp@wlphalen.com

Terry Torline
tjtorline@martinpringle.com
dltweedy@martinpringle.com

Honorable Bruce E. Moore

[24] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.